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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 220

JOVITA PEREZ, PETITIONER

*v.*

THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Customs Court (R. 143) is reported in 17 U. S. Cust. Ct. 331. The opinion of the appellate division of the Customs Court (R. 165) is reported in 19 U. S. Cust. Ct. 292. The opinion of the Court of Customs and Patent Appeals (R. 178) is reported in 84 Treasury Decisions (Advance Pamphlet 19) at page 13.

### JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 1, 1949 (R. 188).

Petition for rehearing was denied on May 2, 1949 (R. 211). The petition for a writ of certiorari was filed on July 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1256.

### QUESTION PRESENTED

Whether the court below erred in holding that there was no substantial evidence in the record to sustain the judgment of the appellate division of the Customs Court.

### STATUTE INVOLVED

The pertinent provisions of the Tariff Act of 1930, as amended (46 Stat. 590; 52 Stat. 1077; 19 U. S. C. 1402) are set forth in the Appendix.

### STATEMENT

In August, 1942, the Pepsi-Cola Company, a domestic corporation, organized the Mexican-American Flavors Co., S. A., of Monterrey, Mexico, for the purpose of manufacturing, in Mexico, a flavoring syrup to be used in the United States in the manufacture of the beverage known as "Pepsi-Cola". The syrup thus manufactured was known as "El Masco," and the entire production of the Mexican company for a period of about 13 months [1] was sent by that company to the United States for ultimate use by franchised bottlers of "Pepsi-Cola." (R. 23-26, 182.)

On November 24, 1942, there was imported into the United States at the port of Laredo, Texas, six

[1] At the end of that period the company went into liquidation.

50-gallon barrels of the El Masco syrup which had been manufactured by Mexican-American Flavors Co. The flavoring syrup was entered by petitioner for ad valorem duty purposes at a net value of $167.06 per unit of six barrels. The customs appraiser appraised the merchandise on the statutory basis of the "cost of production" as defined in Section 402(f) of the Tariff Act, *infra*, pp. 13-14, and advanced the value thereof to $215.16 per unit of six barrels. (R. 179.) Petitioner filed an appeal for reappraisement by the Customs Court under Section 501 of the Tariff Act of 1930 (46 Stat. 590, 730; 19 U. S. C. 1501) (R. 4-5), and that court (a single judge sitting as a trial court) found the statutory cost of production of El Masco to be $135.25 per unit of six barrels (R. 143-160).[2]

Thereafter both the United States and petitioner appealed to the appellate division of the Customs Court (R. 161-164), and that division modified the judgment of the single judge by finding and holding that the statutory cost of production of the merchandise was $147.85 per unit of six barrels[3]

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[2] Both parties agreed that the statutory cost of production was the proper basis for appraising El Masco syrup (R. 182). Section 402(a) of the Tariff Act, *infra*, p. 13, provides that for the purposes of that Act the value of imported merchandise shall be the foreign or export value, whichever is the higher; if there be no foreign or export value then the United States value; and if there be no foreign, export, or United States value, then the cost of production.

[3] Section 503 of the Tariff Act of 1930 (46 Stat. 590; 19 U.S.C. 1503) provides that the basis for assessing ad valorem duties on imported merchandise shall be the entered value or the final appraised value, whichever is higher. Since the value found by the appellate division, $147.85, was lower

(R. 165-176). On appeal by the United States, the Court of Customs and Patent Appeals reversed the decision of the appellate division of the Customs Court, holding that there was no substantial evidence in the record to sustain either the judgment of the trial judge or the judgment of the appellate division of the Customs Court (R. 178-185), and remanded the case for further proceedings (R. 188).

ARGUMENT

The only issue in the case at bar is the question whether there was any substantial evidence in the record to sustain the finding of the appellate division of the Customs Court that the statutory cost of production of El Masco syrup was $147.85 per unit of six barrels of 50 gallons each.[4] That question turns, of course, on the peculiar facts in the case at bar. Moreover, it is unlikely that the unique circumstances which gave rise to the issues presented will recur. It is plain at the outset, therefore, that the case presents no question which warrants review by this Court.

1. Section 402(a) of the Tariff Act, *infra,* p. 13, provides that in the event there be no "foreign," "export," or "United States," value for imported merchandise, the basis for appraising such merchandise shall be the "cost of produc-

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than the entered value of $167.06, the latter would, in the absence of reversal, have become the basis for assessing the duties in the instant case.

[4] The review of Customs Court decisions in reappraisement cases is upon questions of law only. See 19 U. S. C. (1946 ed.) 1501, now 28 U. S. C. 2637.

tion."[5] Section 402(f) provides that the cost of production shall be the sum of:

> (1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;
>
> (2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;
>
> (3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and
>
> (4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

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[5] Foreign, export, and United States values are defined in subsections (c), (d), and (e), respectively, of Section 402 of the Tariff Act of 1930 (46 Stat. 590, 709; 19 U. S. C. 1402).

Both parties herein have agreed that cost of production was the proper basis for appraising El Masco syrup (R. 167, 182). Furthermore, there was no dispute between the parties with respect to the amounts of the items of cost set forth in the first three paragraphs of Section 402(f), *supra* (R. 168). Consequently, the only controverted question left for decision by the appellate division of the Customs Court was limited to a determination of the amount of the "profit" required by the fourth paragraph of Section 402(f), *supra,* to be added to the aggregate of the other items of cost provided for in the first three paragraphs of that section in order to complete the statutory cost-of-production formula. Thus, while the broad issue before the Court of Customs and Patent Appeals was whether there was any substantial evidence in the record to sustain the appellate division's finding with respect to the cost of production, the controversy before that court was limited to the question whether the appellate division's finding with respect to the item of profit to be added to the aggregate of the other cost factors was supported by any substantial evidence.

The evidence relied upon by the trial court to support its finding that the cost of production of El Masco syrup was $135.25 per unit of six barrels, which included a profit of 35 per cent, consisted of matters purporting to show the amounts ordinarily added as profit to their production costs by three Mexican syrup manufacturers other than Mexican-

American Flavors Co. This evidence was found by the appellate division of the Customs Court to be inadequate for the purpose, since these companies had not kept books of account or other substantial records to show the amounts they had added as profits to their production costs. The appellate division also pointed out other reasons why the evidence relating to these companies was inadequate, *e. g.*, (1) the American importers of their syrup furnished part of the labor and materials entering into the manufacture of the products of some of the companies, and (2) the evidence purporting to show the amounts of the profits added by some of those companies was hearsay in character (R. 171-173). The Court of Customs and Patent Appeals reached the conclusion that there was substantial evidence in the record to sustain this finding by the appellate division,[6] and its holding is clearly justified by the evidence pointed out above, which the appellate division emphasized to support its finding.

The evidence relied upon by the appellate division of the Customs Court to support its finding that the cost of production of the imported syrup was $147.85 per unit of six barrels, which included a profit equalling 44.59 per cent of the other costs, consisted of cost-of-production sheets introduced by both parties (R. 168) and the testimony of

[6] Since this finding was adverse to petitioner, and since he took no appeal therefrom to the Court of Customs and Patent Appeals, it is not clear that petitioner was in a position in the court below to attack the finding.

Walter S. Mack, Jr., who was President of both Pepsi-Cola Company and Mexican-American Flavors Co. (R. 175-176). Mr. Mack testified that at the time of the organization of Mexican-American Flavors Co., and before it began to manufacture El Masco syrup, the sales price of that syrup was fixed at $296.00 per unit of six barrels, and that it was estimated at that time that the profit which the company would add would be $44.00 per unit of six barrels, or approximately 33 per cent. of production costs (R. 29-36). On redirect examination he testified that the only reason for fixing the sales price at $296.00 per 300 gallons, or six-barrel unit, was because it was estimated that that amount would be the maximum price which the small Pepsi-Cola bottlers would be able to pay and maintain a retail price of five cents per bottle (R. 37). Mr. Mack's testimony did not purport to show the profit actually added by his Mexican company to its production costs.

The appellate division of the Customs Court found that Mr. Mack's testimony was sufficient to show the profit ordinarily added by Mexican-American Flavors Co. to its production costs. On the Government's appeal, however, the Court of Customs and Patent Appeals reversed on the ground that Mr. Mack had given no testimony at all to show the profit usually added by his company, since he had admitted that the amount he claimed was added by the company for profit was merely an estimate which had been made prior to the time

the company had begun to manufacture the syrup, and since he had also testified that the sales price of the syrup had been fixed without regard to cost of production or profit (R. 187). The court below concluded that "The item of profit [provided for in Section 402(f)] cannot be based upon the 'estimated profit' but must be based on the profit usually added." In reaching this conclusion the court below pointed out that Mexican-American Flavors Co. had, after it began to manufacture El Masco syrup, kept thorough accounting records. It then noted that the only substantial evidence in the record as to the amount of profit added by that company to its production costs, was that embodied in the Customs Agent's report, prepared from the company's records and from interviews with its officers, which report plainly showed that the actual profit added by that company to its production costs was $99.25 per unit of six barrels, or 98.15 per cent. of its production costs[7] (R. 185-186).

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[7] In this connection, the court below expressed the view that since Mexican-American Flavors Co. was the only Mexican syrup manufacturer which had kept records from which the cost of production could be ascertained, it was, for the purpose of this case, the sole manufacturer in Mexico of merchandise of the same class or kind as the merchandise here involved. Thus, the court below applied to Section 402(f), *infra*, pp. 13-14, the construction which it had previously placed upon Section 402(e) of the Tariff Act of 1922 (42 Stat. 949) in the case of *United States* v. *Henry Maier*, 21 C. C. P. A. 41, to the effect that the profit ordinarily added by the manufacturer of imported merchandise may be resorted to where merchandise of the same general character is not produced by other manufacturers in the country of origin. The language of Section 402(f) of the 1930 Act is identical with that found in Section 402(e) of the 1922 Act.

The rejection by the court below of the testimony of Walter S. Mack, Jr., that Mexican-American Flavors Co. had added to its production costs $44.00 per unit of six barrels, or 33 per cent., as profit, was obviously justified. This witness admitted on cross-examination that the amount he claimed was added as profit was merely an estimate which had been made before the company had begun to manufacture syrup. It would be obviously wrong in any circumstances to accept a pre-manufacture estimate of the profit to be added to production costs as evidence of the profit "ordinarily added" to such costs after manufacture, but it would be absurd to accept such an estimate as the best evidence of the profit actually added, in the face of detailed records made during the course of manufacture showing a realized profit nearly three times greater than the amount estimated. The statutory cost of production found by the appellate division could not be legally determined in the absence of evidence showing the profit ordinarily added by the company, and since there was no substantial evidence before that division to show what amount was ordinarily added by the company as profit, we submit that the court below committed no error in holding that there was no substantial evidence in the record to sustain the judgment of the appellate division of the Customs Court.

Petitioner's contention (Pet. 15-16) that the court below exceeded its appellate power by weighing the testimony of Walter S. Mack, Jr., is with-

out merit. The court below did not weigh that testimony. It held that Mack's testimony was incompetent for the purpose of showing the amount of profit added by his company, because the amount which he stated had been added was merely a pre-manufacturing estimate which could not be legally used to show the amount of profit usually added by a manufacturer.

2. Petitioner contends that Treasury Decision 48860, *infra*, pp. 14-15, which he states was followed by the appraiser in this case, is contrary to Section 402(f), *infra*, pp. 13-14, and is therefore invalid (Pet. 2-3, 11-12), but he does not make clear wherein its alleged invalidity lies. He states that the method suggested therein for ascertaining the profit to be added to production costs is not the formula used by manufacturers in general, and by Walter S. Mack, Jr., in particular in determining the selling price of El Masco syrup. He does not show, however, why the so-called percentage method suggested by him is any more accurate than the method followed by the appraiser; nor does he refute the pronouncement of the court below that the item of profit contemplated by Section 402(f) may not be based on "estimated profit" but only on the profit usually added. We find no substance in petitioner's contention.

## CONCLUSION

The decision below is correct. There is no conflict of decision, and the case does not warrant

further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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AUGUST 1949.

APPENDIX

Tariff Act of 1930 (46 Stat. 590, 708; 19 U. S. C. 1402):

SEC. 402. VALUE.

(a) Basis.—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 336 a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

* * * * *

(f) Cost of Production.—For the purposes of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the par-

ticular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and;

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

Treasury Decision 488860 (71 Treas. Dec. 431):

(3) * * * the "profit which is ordinarily added in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the same gen-

eral trade as the manufacturer or producer of the particular merchandise under consideration," is the usual difference between the manufacturers' or producers' selling prices of such merchandise of the same general character and all costs and expenses incurred by such manufacturers or producers in connection with such merchandise.

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